No. 07-455

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

vs.

AHMED RESSAM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 18 U.S.C. § 844(h)(2) Should Be Construed in a Way That Would Allow Its Mandatory Ten Year Sentence To Be Imposed on a Person Who Innocently "Carries" a Legal and Commonplace But Nonetheless "Explosive" Substance Like Gasoline, Cleaning Fluid or Fertilizer, While Committing an Entirely Unrelated Federal Felony, Such As Uttering a Treasury Check or Making a False Statement.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

ARGUMENT

In construing a statute, we of course focus first on the language of the statute itself. *See, e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). This does not mean, however, that one determines a statute's meaning by "dissect[ing] the meaning of" a single word. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)(Government's "primary focus" on the word "use" in 18 U.S.C § 16 "is too narrow"). *See Gooding v. Wilson*, 405 U.S. 518, 529 (1972)(Burger, C.J.,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

dissenting)(rejecting proposition that individual words should be "dissected with surgical precision using a semantic scalpel"); *Bailey v. United States*, 516 U.S. 137, 145 (1995). Rather, the meaning of a particular word "cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 657 (1998) (internal quotation marks omitted). This "cardinal rule" of statutory construction recognizes that a particular word "gathers meaning from the words around it," *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted); *Leocal*, 543 U.S. at 9. And wherever possible, effect should be given "to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). There is thus nothing remarkable about the proposition that, in context, a given word "may not extend to the outer limits of its definitional possibilities." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006).

"Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). Rather, the analysis should also be informed by neighboring provisions and the "broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). This includes giving a consistent construction to words as they are used throughout a particular enactment, and recognizing that an appropriate construction is one that comports with the objectives that are known to have driven the adoption of the legislation.

For that reason, individual words must be read not only in light of surrounding words and provisions, but also of the congressional purpose underlying the statute. *See, e.g.*, *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 94-95 (1993) (noting that Court interprets statutes "guided not by 'a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy"') ; *Dolan*, 546 U.S. at 486; *Holloway v. United States*, 526 U.S. 1, 9 (1999). Reading the statute as whole, the overall purpose generally becomes apparent. Legislative history is useful to the extent it "reinforces this understanding of the statutory language." *Bowen v. Yuckert*, 482 U.S. 137, 148 (1987).

I. SECTION 844(h)(2)'S IMPOSITION OF A SEVERE, MANDATORY PENALTY ON ANYONE WHO "CARRIES AN EXPLOSIVE DURING THE COMMISSION OF ANY FELONY" MUST BE CONSTRUED IN LIGHT OF THE WORDS USED, THE SURROUNDING PROVISIONS, AND THE STATUTE'S OBJECTIVES

The notion that "[s]tatutory language has meaning only in context," *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005), is nowhere more true than in determining the meaning of "carries an explosive during the commission of any felony" that can be prosecuted in the federal courts, as those words are used in Section 844(h)(2). As Justice Ginsburg has noted, "'carries' is a word of many meanings." *Muscarello v. United States*, 524 U.S. 125, 140 (1998) (Ginsburg, J., dissenting). Standing alone, the word

"carry" could mean, *inter alia*, "transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one's person." *Id.* at 143.[2]

In the context of Section 844(h)(2), the nature of the "carrying" that is subjected to a severe mandatory penalty is defined in the first instance by the fact that it must involve "carr[ying] an explosive during the commission of any felony." Thus, the limits of the "carrying" that is prohibited depend on the substances that are encompassed within "explosive," and what it means to do the act "during the

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[2] Similarly, in the context of the phrases "carries an explosive" or "carries a firearm," it is far from obvious what degree of proximity to the "carrier" is required in order to come within the statute. The Fifth Circuit has held, under Section 844(h)(2), that the phrase applies if an explosive is "available to facilitate the crime or if it emboldened a defendant in his offense[.]" *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991) (internal quotation marks omitted). Prior to this Court's decision in *Muscarello*, several courts of appeals interpreted the similar phrase "carries a firearm" in 18 U.S.C. § 924(c) to apply to guns that are "immediately available." *See United States v. Foster*, 133 F.3d 704, 705-08 (9th Cir. 1998), *overruled by Muscarello*, 524 U.S. at 125; *United States v. Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996), *overruled by Muscarello*, 524 U.S. at 125. Under the reasoning of those cases and the four dissenters in *Muscarello*, whether or not a person "carries" a gun that is located in the glove compartment of his car would turn on whether or not the glove compartment is locked. Although this definition of "carries a firearm" was rejected by the majority in *Muscarello,* the relevant point is that the problem of the locked glove compartment, which sharply divided the *Muscarello* Court, cannot be solved or even anticipated by reference to the word "carries" alone. Such subtleties and nuances in a law's application can only be discerned by considering the surrounding provisions and the statute's purpose.

commission of any felony." At the same time, though, those limitations on the statute's prohibition also draw meaning from their neighboring terms, and from the statute's surrounding provisions and context.

The critical issue in this case is whether "carr[ying] an explosive during the commission of any felony" extends only to carrying that is related to the felony in some way, even though the words "in relation to" do not appear in the statute. In one respect, there can be no dispute that this is true. For even the Government agrees that "it is the defendant—rather than some other individual—who must commit the underlying felony 'during' which the explosive is carried[.]" Gov. Br. at 16. If the statute were read otherwise—if it were read in accordance with the bare meaning of the individual words (among which the word "any" arguably suggests the absence of such a limitation), to extend to carrying explosives during the commission of a felony by anyone at all—it would be satisfied by a simultaneous felony committed by someone else, in which the carrier had no role or knowledge. But reading the statute in that way would be arbitrary and verge on the nonsensical. It would penalize the carrier based on an eventuality wholly beyond his knowledge or control—the fact that a completely unrelated person happens to be committing a federal felony at the same time. This conclusion follows not because of any express statutory language, but because the alternative reading would make the statute a farce.

A. Section 844(h)(2)'s Prohibition on "Carr[ying] An Explosive During the Commission of a Felony" Must Be Understood in Light of the Definition of "Explosive" Set Forth in Section 844(j)

The obvious place to begin in construing the statute's application to "carr[ying] an explosive during the commission of any felony" is with any defined meanings of the terms used. And the word, "explosive," is defined with great clarity—and extraordinary breadth—just two provisions away in the same statute, in Section 844(j). There, following an extensive list of conventionally recognizable explosives—such things as "gunpowders, powders used for blasting, all forms of high explosives, and blasting materials," the statute concludes with a sweeping catch-all provision that encompasses any "other ingredients . . . such . . .that ignition . . .*may* cause an explosion." (Emphasis added.) Clearly the statute's definition was intended to cover "numerous possible explosives not specifically listed." *United States v. Poulos*, 667 F.2d 939, 942 (10th Cir. 1982).

It is thus entirely clear that the substances whose carrying will be penalized under the statute are not confined to articles that anyone could reasonably discern as an "explosive device," or a substance like dynamite or C4 explosive that is conventionally recognized as such. They encompass virtually anything at all that has the capacity to cause an explosion of some sort under some set of circumstances. It is also noteworthy that the statute's breadth is not confined by any limitation as to the quantity of the substance or the size of the explosion that it could possibly produce. Thus, even a

single firecracker will suffice to meet the statute's definition. And certainly, the definition's reach is not confined by any requirement that the act of possessing the item or substance be, apart from its role in an offense defined by Section 844, an illegal act.

The extraordinary breadth of the substances encompassed within the "explosive[s]" whose possession will trigger the application of Section 844(h)(2) is clear not only from the plain words of Section 844(j), but also from the legislative history of that provision. In enacting the Explosives Control Act, of which Section 844(j) is a part,[3] Congress considered two versions of the section that would become Section 844(j), and ultimately, after much discussion and debate, adopted the broader one. As the Seventh Circuit explained in *United States v. Agrillo-Ladlad*, 675 F.2d 905, 905-909 (7th Cir. 1982), during the hearings it was plainly recognized that the broader provision (as adopted) would extend to such "common materials such as gasoline, other flammable liquids, and ammonium nitrate," and that such a definition could adversely impact upon "sportsmen, farmers, and people engaged in legitimate manufacture, transportation, distribution and use of such materials." Hearings on H.R. 17154, H.R. 16699, H.R. 18573 Before Subcomm. No. 5 of the Comm. on the Judiciary, House of Rep., 91st Cong., 2d Sess., at 64, 106 (1970) ("Hearings"). Congress adopted the broader of the two definitions despite these concerns, and despite the Secretary of Interior's

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[3] Title XI of the Organized Crime Control Act of 1970, Pub. L. 91-452, Title XI, § 1102, 84 Stat. 952 (1970).

warning that the broader proposal would define as an explosive any highly flammable substance such as gasoline, cleaning fluids and commercial solvents, and ammonium nitrate, which is a widely-used commercial fertilizer. *See Agrillo-Ladlad*, 675 F.2d at 909 n.5; Hearings at 157. Thus, Congress, in enacting Section 844(j), intended to sweep broadly and encompass in the definition of "explosive" for purposes of the criminal provisions of the Explosives Control Act [4] any substance with the capacity to explode under some circumstances, whether its possession was otherwise legal or not.[5]

Reflecting the plain language and this legislative history, the cases applying the definition of explosives have recognized that Section 844(j) "cast its definitional net quite widely." *United States v. Mena*, 933 F.2d 19, 26-27 (1st Cir. 1991). In order to fall under the Section 844(j) definition of explosive, a substance need only pose "*some possibility* of explosion." *United States v. Colón Osorio*, 360 F.3d 48, 51 (1st Cir. 2004) (emphasis added). The courts of appeals have held that Section 844(j)'s definition of

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[4] Specifically, 18 U.S.C. §§ 844(d)-(i) and 842(p).

[5] As originally enacted in 1970, the provision at issue contained a requirement that the particular act of "carr[ying] an explosive" be done "unlawfully." That requirement was in some tension with the broad definition of "explosives," which plainly extends to many commonplace substances that are legally possessed by numerous people. In 1988, at the same time that Congress inserted language to strengthen the statute's penalties, it eliminated the requirement that the carrying of the explosive be done "unlawfully," and thus clarified that the statute could apply to the otherwise wholly lawful carrying of lawful substances. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 6474(b), 102 Stat. 4181, 4380 (1988). *See infra,* at 15.

explosive includes gunpowder contained in a small legal firecracker or a single bullet. *United States v. Davis*, 202 F.3d 212, 219 (4th Cir. 2000). Similarly, Fourth of July display fireworks are explosives within the Section 844(j) definition. *United States v. Shearer*, 479 F.3d 478, 482 (7th Cir. 2007). Also included in Section 844(j)'s sweep are everyday substances like gasoline. *See, e.g.*, *United States v. Anderson*, 782 F.2d 908, 912 (11th Cir. 1986); *United States v. Lee*, 726 F.2d 128, 131 (4th Cir. 1984); *United States v. Beldin*, 737 F.2d 450, 455 (5th Cir. 1984); *United States v. Lorence*, 706 F.2d 512, 516-17 (5th Cir. 1983); *United States v. Bunney*, 705 F.2d 378, 380-81 (10th Cir. 1983). *But see United States v. Gelb*, 700 F.2d 875, 878-79 (2d Cir. 1983) (rejecting application of §§ 844(h) and (i) to defendant's use of gasoline to set fire to a commercial building he owned). Even naturally occurring substances fall within the definition of explosives for purposes of these criminal statutes, provided that they meet the requirement of a capacity possibly to explode. *See United States v. Hepp*, 656 F.2d 350, 352 (8th Cir. 1981) (holding that a "mixture of methane and air" is sufficient to satisfy § 844(j)'s definition of "explosive").

It is ironic that, while Congress adopted the broader of the two considered definitions of "explosive" for use in the criminal provisions of Section 844 and in Section 842(p), it enacted the narrower definition to govern the scope of substances subject to federal regulation. *See* H.R. 18573 (narrow definition of explosive as contained in proposed legislation); 18 U.S.C. § 841(d) (definition of explosive for the purpose of federal regulation). As a result, "explosive" is defined more narrowly in the context of licensing and other regulatory activities than it is for

the purposes of criminal law. *Compare* 18 U.S.C. §§ 841(d) and 844(j). Thus, substances that are not only legal, but that may be acquired and possessed without a federal permit, can nonetheless become the predicate for a severe mandatory criminal penalty if that possession occurs "during the commission of any [federal] felony," whatever exactly those words mean as used in Section 844(h)(2).

B. Because "Explosive[s]" Are Expressly Defined in the Statute to Include Many Legal and Common Substances, Section 844(h)(2) Imposes Heavy Mandatory Criminal Penalties on the Basis of Conduct that May Be Wholly Innocent Standing Alone, and Objectionable Only Because of Any Relationship It Bears to the Predicate Felony

It follows unmistakably from the sweeping definition of "explosives" set forth in Section 844(j) that a hypothetical statute that criminalized merely "carr[ying] an explosive" would penalize a range of entirely common activities. A hunter who possesses gunpowder and loads his own shotgun shells—or even just possesses bullets manufactured by someone else; a vendor—or even a user—of Fourth of July fireworks; a farmer using explosive fertilizer for his crops—or a homeowner using it for his yard; or anyone pouring gasoline into a lawnmower—or even putting it into his car—is involved in the act of "carr[ying] an explosive" within the broad definition provided in Section 844(j).

The prohibition of Section 844(h)(2), with its severe mandatory sentence, is precisely this hypothetical statute, with the added requirement that the act of "carr[ying] an explosive" must occur

"during the commission of any felony." Thus, if Section 844(h)(2) is to avoid a meaning nearly as absurd as the hypothetical statute outlined above, it can only be because of the meaning ascribed to "during the commission of any felony," and its relation to the act of "carr[ying] an explosive."

Thus, the Government's position that no relationship at all need exist between the carrying of explosives and the predicate federal felony under Section 844(h)(2), leads inherently to a highly unreasonable construction of the statute. With felonies defined in federal law as crimes not otherwise classified for which the "maximum term of imprisonment authorized is . . . more than one year," 18 U.S.C. § 3559(a), the mandatory ten or twenty year sentence enhancement based on the unrelated, lawful, and entirely normal carrying of everyday substances which happen to qualify as "explosive[s]," will frequently dwarf the sentence for the defendant's predicate felony. And, ironically, that predicate felony may well be a defendant's only illegal conduct. A sentence enhancement based on the lawful possession of a legal explosive substance during the commission of a felony only makes sense if such otherwise lawful conduct bears a relationship to the commission of the felony.

Consider the consequences if "carrying . . . during" imparts no requirement of a relationship between the "carrying" and the underlying felony. Take for example the felony charge of making a false statement to a United States custom official. 18 U.S.C. § 1001. Since the definition of "explosive" encompasses some cleaning fluids and commercial solvents, Section 844(h)(2)'s ten year penalty would

attach to a domestic worker who crosses over the border from Mexico to California in order to do domestic work while carrying such work supplies, and falsely states to the customs official that she is crossing the border for a short vacation. *See Agrillo-Ladlad*, 675 F.2d at 909 n.5 (noting that "cleaning fluids and many other commercial solvents" fall within the definition of "explosive"). In the absence of any required relation between the predicate felony and the carrying of explosives, Section 844(h)(2) could be invoked to drastically increase the sentence she faces. If, on the other hand, Section 844(h)(2) is properly read to include a relational requirement between the felony and the explosive, the maid would face a far less severe penalty—a fine or imprisonment of not more than 5 years, as prescribed by 18 U.S.C. § 1001(a).

Under the Government's construction, requiring no relationship between the predicate felony and "carr[ying] an explosive," innumerable instances arise where the heavy ten or twenty year penalty proscribed by Section 844(h)(2) would attach based on legal, innocent and utterly routine conduct. If a farmer charged with making false statements to influence the Federal Crop Insurance Corporation (in violation of 18 U.S.C. § 1014) were carrying commercial fertilizer (with the capacity to explode) when the loss adjustor stopped by to talk with him, the Government's construction of the statute would expose him to an additional ten years in prison despite the fact that the ammonium nitrate was perfectly legal for him to possess and in no way related to the underlying felony. *See Agrillo-Ladlad*, 675 F.2d at 909 n.5 (noting that the definition of "explosive" "includes ammonium nitrate which is a

widely-used commercial fertilizer"). A similar result would obtain for a person attempting to cash a counterfeit check, *see* 18 U.S.C. § 513(a), while carrying a firecracker in his pocket. Or a hunter falsely claiming to a Forest Service Ranger that he possesses a hunting license while carrying ammunition for his hunt.

Such sentences are completely arbitrary, precisely because they attach extremely severe consequences to behavior—here the innocent possession of common substances which is entirely legal apart from whatever consequences flow from the provisions of Section 844(h)(2)—which its perpetrator could reasonably have believed to be entirely proper. As this Court said in *Arthur Andersen LLP v. United States,* 544 U.S. 696, 703 (2005), the Court's "traditionally exercised restraint in assessing the reach of a federal criminal statute . . . is particularly appropriate . . . where the action underlying the conviction . . . is by itself innocuous." (Internal quotation marks omitted.)

In this case, such restraint requires nothing more than simply reading the statute's prohibition in context, attentive to all of its words and with the consequences of alternative reasonable constructions in mind. When "carries an explosive during the commission of any felony" means carrying it in a manner bearing some relation to that felony—and only then—the carrying of an explosive aggravates the character of the underlying felony and justifies a sentence enhancement. The fact that the dangerous instrumentality of an explosive substance has been brought to bear in connection with the commission of a felony renders the underlying crime more serious.

And this may be a reasonable conclusion even if the mere act of possessing the substance is entirely legal.

Thus, while it makes no sense that a farmer innocently carrying commercial fertilizer while making an unrelated false statement to a government official should be sentenced under Section 844(h)(2), it makes perfect sense for a person whose carrying of the same substance has some role to play in the commission of a different crime. This is true even where the possession of the substance, standing alone, may otherwise be entirely unobjectionable.[6]

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[6] Indeed, if the statute is not read as requiring some relation between the carrying of the explosive and the underlying felony, there may even be constitutional questions regarding the statute's validity as a matter of equal protection and/or substantive due process analysis. It is entirely irrational and arbitrary to heavily punish the completely commonplace and legal carrying of items like gasoline, fertilizer, or cleaning fluid, simply because the carrying occurs at the same time as a completely unrelated felony. *See Matthews v. de Castro*, 429 U.S. 181, 185 (1976) (a law will not be upheld under the rational basis test if it is "clearly wrong, a display of arbitrary power, not an exercise of judgment") (internal quotation marks omitted). Under the Government's reading of § 844(h)(2), two individuals who committed identical felonies would face very disparate penalties, simply because one of them happened to be carrying one of these legal and common, but nonetheless "explosive" substances, even though it does not relate to the underlying felony. Imposing such differing punishments on two people with indistinguishable culpable conduct bears no rational relationship to any discernible purpose that Congress may have had in enacting the statute. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall

C. The Historical Evolution of the Statute's Provisions and Its Overall Purpose Confirm that an "Explosive" Must Be "Carrie[d]" in Relation to the Predicate Felony

The unreasonableness of the Government's assertion that Section 844(h)(2) applies even absent any relationship between the carrying of explosives and the commission of the required felony is apparent for several further reasons.

First, in addition to defining "explosive" in the original 1970 statute in a manner that clearly encompassed legal and ordinary substances, Congress in 1988 clarified beyond doubt that the statute may be triggered by the carrying of explosives that, standing alone, is entirely legal and proper. In that year, at the same time that Congress inserted language to increase the statute's penalties, it eliminated the pre-existing requirement that the carrying of the explosive be "unlawful." Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong., § 6474(b) (1988).[7] Having originally adopted a very broad

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be treated alike.'") (quoting *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974)).

[7] The 1988 amendment also inserted language increasing the mandatory minimum penalty for violating 18 U.S.C. § 844(h) from one year to ten years. *See* Anti-Drug Abuse Act § 6474(b)(2). A bill analysis in the Congressional Record simply notes that "Section 6474(b) would strengthen the offense in 18 U.S.C. 844(h) of using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted in the Comprehensive Crime Control Act of 1984 and the Firearms Owners' Protection Act of 1986 with respect to the parallel offense of using or carrying a

definition of explosives in Section 844(j), Congress now made explicit that the carrying of those explosives need not be illegal for the statute's heavy penalties to apply—it need only be "during the commission of a federal felony." Had Congress supposed that the "during the commission" limitation had the meaning that the Government now ascribes to it—and that minor federal felons could trigger the statute's ten year minimum sentence through innocent and legal conduct unrelated to the predicate felony—one might have expected someone to at least raise the issue. But the legislative history does not indicate that the thought ever occurred to anyone. In the absence of any comment raising the possibility of such a remarkable consequence, it is not reasonable to find it within the contemplated meaning of the statute. Congress's silence under these circumstances "can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991). The absence of legislative comment should lead to the "common sense" conclusion that Congress did not intend such an extreme and implausible meaning. *See, e.g.*, *Koons Buick Pontiac GMC, Inc. v. Nigh,* 543 U.S. 50, 63 (2004); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (Stevens,

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firearm during the commission of federal offenses. Presently, as a result of the above-referenced amendments to 18 U.S.C. 924(c), a person who uses a firearm to commit a bank robbery would be subject to harsher penalties than a person who committed the same offense using an explosive. There is no justification for this disparity." 134 Cong. Rec. S17360-02 (1988). Of course, under § 924(c), the statute states that the carrying must be "in relation to" the underlying crime.

J., concurring); *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

Second, the bizarre results that flow from the Government's construction are not supported by the legislative history of Section 844(h), which indicates a general intent to create enhanced penalties for introducing the often-dangerous instrumentality of explosives into the commission of federal crimes. That history indicates a purpose to "protect interstate and foreign commerce by reducing the hazards to persons and property associated with the misuse of explosives." H.R. Rep. No. 91-1549, at 64 (1970). In fact, Congress passed Section 844 specifically to confront the "threat of bombings [that] ha[d] become an ugly and recurrent incident of life" in American cities as signs of protest against the Vietnam War in the late 1960s and 1970. Hearings at 1. These events that led Congress to act occurred when a person used or carried explosives in relation to misconduct, such as the commission of another crime. It is this behavior that Congress aimed to combat. These hazards do not occur when one properly possesses and uses legal substances and also happens to commit a crime to which the substances have no connection of any sort, and Congress did not intend to curtail such legal conduct.

Finally, it is instructive that the appropriate reading of the words "carries explosives during the commission of a federal felony," follows a repeated and understandable pattern of other federal criminal provisions, which impose one penalty for a base offense, and a separate offense based on the use or presence of a specified dangerous instrumentality in connection with the commission of the crime. The

federal firearm statute, for example, provides for a mandatory minimum sentence of five years when a person carries or uses a firearm "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c). Similarly, under the federal bank robbery statute, the maximum penalty in the absence of a "dangerous weapon or other device" is twenty years, 18 U.S.C. § 2113(a), whereas, with the use of such an instrumentality, it is twenty-five years, 18 U.S.C. § 2113(d).

In enacting Section 844(h), Congress made clear that the new explosives statute was patterned on the existing gun control statute. *See* H.R. Rep. No. 91-1459, at 69 ("[§ 844(h)] carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a federal felony"). Certainly there is no reason to shy away from the sensible conclusion—that otherwise follows from the statute's words in context—that the statute imposes a quite severe sentence enhancement on the basis of what may otherwise be perfectly lawful conduct, when and *because* a dangerous instrumentality was used or possessed in relation to the underlying crime.

II. THIS CASE PROVIDES A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED, BECAUSE RESPONDENT WAS CONVICTED OF SEVERAL SERIOUS OFFENSES IN WHICH THE CARRYING OF EXPLOSIVES PLAYED AN INTEGRAL PART

The statutory construction question presented in this case is whether Section 844(h)(2)'s severe sentence enhancement "requires that the explosives

be carried 'in relation to' the underlying felon." Gov. Br. at i. As discussed above, the proposition maintained by the Government, that no relationship of any kind is required, faces tough sledding when the facts of the case actually mirror that premise. Minor felons who forge checks or misstate any fact to a federal official run the risk—and thus may have to plea bargain against the threat—of possible mandatory sentences of ten or twenty years, because they are unlucky enough to have gasoline in their car's tank or cleaning solvents in their trunk.

The facts of this case present none of these difficulties. Here, respondent's carrying of explosives was instrumental to his criminal conduct. Respondent was charged with nine counts, five of which appear to relate to his carrying of explosives. He was charged—and convicted after trial—of an act of terrorism transcending a national boundary in violation of 18 U.S.C. § 2332b(a)(1)(B) (Count 1), and respondent carried the explosives in order to further his felony act of terrorism. Respondent was also charged and convicted of placing an explosive in proximity to a terminal in violation of 18 U.S.C. § 33 (Count 2), smuggling explosives into the United States in violation of 18 U.S.C. § 545 (Count 6), transportation of explosives without a permit in violation of 18 U.S.C. § 842(a)(3)(A) (Count 7), and the unregistered possession of a destructive device in violation of 26 U.S.C. § 5861(d) (Count 8). Presumably, any of these counts would have amply supported the charge under Section 844(h)(2), had the government simply bothered to charge the case in that way.

Instead, although respondent was charged with multiple counts that were closely related to his carrying of an explosive, the Government chose not to charge Section 844(h)(2) in connection with any of these counts. For reasons known only to the Government, [8] the indictment appended Section 844(h)(2)'s enhancement to a charge of making a false statement to a customs official, an offense completely unrelated to the carrying of an explosive. As a result, the Government has presented a legal issue that only exists in this case because of the Government's peculiar charging decisions, and not because the respondent's felonious conduct lacked a relationship to his carrying of an explosive.

It is impossible to reflect on this case without focusing on the fact that it involved a carefully-conceived terrorist plot to blow up Los Angeles International Airport. Given the gravity of these facts, this case appears deceptively easy. A person who carries explosives to further a crime of terrorism deserves grave penalties. But a check forger with a legal firecracker in his pocket and a housekeeper who

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[8] One plausible speculation as to the reason for this decision was that the Government was unsure of its ability to prove the intent required by the full-blown terrorist-related course of conduct put in issue by the charge in the first count. Perhaps it thought that the jury might decline to find proof beyond a reasonable doubt of the underlying terrorist plot, and thus sought to secure a substantial mandatory of sentence of no less than ten years, even if that came to pass. The question whether § 844(h)(2) should apply to a defendant convicted only of making a false statement, by a jury that rejects a series of other allegations in which carried explosives actually played an important role, is the real question presented to the Court. On the present facts, it is entirely hypothetical.

lies at the border while carrying cleaning supplies do not. The Question Presented actually determines the outcome in the latter cases—but not in cases with facts like those now before the Court. Thus, the Court may wish to consider awaiting a case that more clearly frames the breadth and consequences of the Government's proposed statutory construction before deciding this issue.

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